UNITED
NATIONS

AT

Administrative Tribunal

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AT/DEC/853
25 November 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 853

Case No 952: WASSEF

Against : The United Nations Joint Staff Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, on 25 February 1996, Maher Nabih Wassef Gerges, a former participant in the United Nations Joint Staff Pension Fund, hereinafter referred to as UNJSPF, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 14 October 1996, the Applicant filed a corrected application, requesting the Tribunal, inter alia:

"(a) [To rescind]

(i) the Standing Committee's decision of 15 August 1996 (...) to uphold the decision of the FAO Staff Pension Committee,

(ii) the decision of 23 March 1996 (...) taken by the FAO Staff Pension Committee upon review of my 'request' of 2 December 1995 (...),

...

(c) [and to order the United Nations Joint Staff Pension Board to effect]

...

(ii) the payment of my relevant disability benefit entitlements since 7 January 1994,

(iii) the award of US$ 1 Million as compensation for the continuous and constant psycho-physical, moral and financial damages and injuries since August 1993,

(iv) the payment of 24.25% cost of money for all amounts due to me equivalent to the same cost of money paid by me for obtaining financing (...),

(v) the payment of 6,000 United States dollars for the cost of this complaint and for the various related applications, request for review, appeal and fax/phone communications.

(d) Compensation claimed in the event that the Secretary-General decides, in the interest of the UN, to pay compensation for the injury sustained;

Without prejudice to all my rights and entitlements and any other judgement by any Tribunal; (i) the payment of all due benefits for my unconditional, total [and] permanent disability since 7 January 1994; and (ii) the award, independently from above benefits, of a lump-sum of US$1,000,000 plus a monthly payment for life of an amount equivalent to a P-4 monthly salary effective 7 January 1994. This monthly salary [is] to include the post adjustment for Rome and to take into consideration the yearly Within Grade Salary Increment.

(e) Other relief:

(i) [to] award me the amount of US$ 1 Million as punitive damages,

(ii) [to] include in [the Tribunal's] decision a penalty clause for the execution of the judgement within 30 days of its date equivalent to 10,000 United States dollars for each month of delay."

Whereas the Respondent filed his answer on 27 March 1997;

Whereas the Applicant filed written observations on 23 April 1997;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Food and Agriculture Organization (FAO) in 1979 and served until 1984. The Applicant was re-employed by FAO from 1986, when he served, with interruptions, on different types of contracts, until 7 January 1994, when he separated from service. The date of the Applicant's separation was recently changed by

FAO to 26 February 1994, to implement Judgement No. 1531 of the International Labour Organization Administrative Tribunal.

On 23 August 1993, the Applicant was medically evacuated from Chad to Paris, where it was determined that he was suffering from hepatitis B. The Applicant convalesced in Rome, and did not return to work. His contract had been extended while he was on sick-leave. On 4 January 1994, the Applicant's physician in Rome certified that the Applicant "[m]ight resume his proper working activities taking care, for the next sixty days of convalescence, [to] avoid heavy working duty and working activities which require intense psycho-physical stress." The Applicant was separated from service on 7 January 1994. Based on his benefit election and payment instructions to the UNJSPF dated 11 July 1994, the Applicant received a withdrawal settlement in October 1994.

On 14 September 1995, the Applicant wrote to the Secretary, FAO Staff Pension Committee (the FAO Pension Committee) and requested the award of a disability benefit. On 24 October 1995, the FAO Pension Committee unanimously decided not to award the Applicant a disability benefit, noting that "the participant was declared fit for work on 4 January 1994, both by his own physician and the FAO Medical Service and was separated on 7 January 1994 ..."

The Applicant's request to the FAO Pension Committee for review of its negative decision was considered by the FAO on 19 March 1996. It was rejected on 23 March 1996. The Minutes of the FAO Pension Committee read, in part, as follows:

> "The Committee noted that the former participant had submitted additional documentation, which, however, was not of a medical nature. The Committee also noted that the separation of the former participant constituted no administrative error. The Chief of the Medical Service pointed out to the Committee that at the time of separation the participant had completely recovered from his illness and was declared fit to return to work, as documented by a statement from the participant's own doctor.
>
> In view of the above, the Committee saw no grounds for reversing the decision taken [...] and unanimously decided that the participant was not incapacitated for further service under article 33 at the time of separation and that his request for review be rejected."

After several exchanges of correspondence with the Secretariat of the UNJSPF, on 9 April 1996, the Applicant lodged an appeal with the Standing Committee of the UN Joint Staff Pension Board (the Standing Committee), against the FAO Pension Committee's decisions. On 29 May 1996, the Secretary of the UNJSPB received the following report from the Medical Consultant to the Board:

> "Receipt is acknowledged of a report from Dr. ... dated 17 April 1996 regarding the case of the above-mentioned participant [the Applicant]. Please be informed that I agree with the FAO Staff Pension Committee's recommendation that [the Applicant] was not incapacitated for further service at the time of separation ..."

On 17 July 1996, the Standing Committee upheld the decision taken by the FAO Pension Committee, that, when he was separated from FAO service early in 1994, the Applicant was not incapacitated for further service within the meaning of article 33 of the UNJSPF's Regulations. The Standing Committee concluded, therefore, that the Applicant was not entitled to a disability benefit.

On 15 August 1996, the Secretary of the UNJSPF wrote to the Applicant, informing him as follows:

> "This is to advise you that your appeal to the Standing Committee of the Pension Board against the decision by the FAO Staff Pension Committee (276th meeting held on 24 October 1995), confirmed upon review by that Committee (278th meeting held on 19 March 1996), was considered by the Standing Committee, at its 179th meeting held on 17 July 1996.
>
> At its above meeting, the Standing Committee considered ... the merits [of] your appeal, as formulated in your submission of 9 April 1996. Based on the available medical and other documentation in the case, the Standing Committee decided to uphold the decision in your case that had been taken by the FAO Staff Pension Committee and then confirmed by that Committee upon review, to the effect that you were not incapacitated for further service within the meaning of article 33(a) of the Pension Fund's Regulations at the time of your separation from FAO service on 7 January 1994 and that, therefore, you were not entitled to a disability benefit from the Pension Fund. If you should wish to lodge an appeal challenging the decision of the Standing Committee, you would have the following options in pursuing the matter:

(a) You could request that the Standing Committee should review its decision (in which case you would have the right to request the establishment of a medical board), pursuant to Rule K.7 in the Pension Fund's Administrative Rules; or

(b) You can submit an appeal to the United Nations Administrative Tribunal.

We are ready to respond to any questions that you may have in this matter."

On 14 October 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contention is:

The Applicant should receive a disability benefit since his illness was contracted while he was in the FAO's service and he was incapacitated for further service at the time of his separation.

Whereas the Respondent's principal contention is:

The Applicant does not meet the criteria for payment of a disability benefit under either Article 33 of the Regulations of the UNJSPF or Rule J.2(a) of the UNJSPF's Rules, as he was not incapacitated for further service and had already received a withdrawal payment at the time of his application to the Tribunal.

The Tribunal, having deliberated from 5 to 25 November 1997, now pronounces the following judgement:

I. The Applicant is appealing against a decision of the Standing Committee of the United Nations Joint Staff Pension Board (the Standing Committee), rejecting an appeal by the Applicant seeking the award of a disability benefit from the United Nations Joint Staff Pension Fund (the Fund), following his separation from the service of the Food and Agricultural Organization of the United Nations (FAO) in 1994.

II. In August 1993, during his assignment in Chad, the Applicant contracted hepatitis B. As a result, on 14 September 1995, the Applicant

requested to be considered for the award of a disability benefit from the Fund. Based on evidence that the Applicant was declared fit for work on 4 January 1994, both by his own physician and by the FAO Medical Service, the FAO Pension Committee decided not to award him a disability benefit. The FAO Pension Committee, which reviewed this decision at the Applicant's request, decided to maintain it.

III. On 9 April 1996, the Applicant submitted an appeal to the Standing Committee, which upheld the decision taken by the FAO Pension Committee that the Applicant was not incapacitated for further service within the meaning of article 33 of the Fund's Regulations and was not, therefore, entitled to a disability benefit from the Fund.

IV. The Tribunal has to determine whether the FAO Pension Committee or the Standing Committee violated the Applicant's rights in their rejection of the Applicant's request for the award of a disability benefit. In considering the Applicant's case, the Standing Committee had to determine if the Applicant was "incapacitated" within the meaning of article 33 of the Fund's Regulations. This article reads:

> "(a) A disability benefit shall, subject to article 41, be payable to a participant who is found by the Board to be incapacitated for further service in a member organization reasonably compatible with his abilities, due to injury or illness constituting an impairment to health which is likely to be permanent or of long duration.
>
> (b) The benefit shall commence on separation or, if earlier, on the expiration of the paid leave due to the participant and shall continue for as long as the participant remains incapacitated, provided that after age 55 incapacity shall be deemed to be permanent."

V. Based on the evidence in the file, the Tribunal cannot conclude that the Applicant qualifies for a disability benefit under the terms set out in article 33. According to this provision, the incapacity of the Applicant must be due to an illness which is likely to be permanent or of long duration. This had not been demonstrated by convincing evidence. Moreover, the medical evidence attached to the application relates to periods well after the date of the Applicant's separation from the FAO's

service, and thus does not indicate the Applicant's state of health at the relevant time, namely in January 1994.

VI. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Samar SEN
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

New York, 25 November 1997

R. Maria VICIEN-MILBURN
Executive Secretary

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25 November 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 854

Case No 953: ISLAM

Against : The United Nations Joint Staff Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, on 10 November 1996, Md. Matiul Islam, a participant in the United Nations Joint Staff Pension Fund, filed an application requesting the Tribunal, in part:

> "[The production of certain documents and the rescission of the decision by the Standing Committee of the United Nations Joint Staff Pension Board] that the two periods of [the] Applicant's Pension Fund participation (3 January 1982 - 30 June 1987 and 13 September 1987-28 February 1993) could not be linked under article 21(b) of the [Pension] Fund's Regulations.
>
> ...
>
> 8. [While] the Applicant does not dispute the facts of the case and the pronouncement of the Standing Committee that [the Pension] Fund's Regulations as adopted left no room for discretionary decisions by the Pension Board. ... the Applicant's contention is that he has not exhausted all avenues for getting redress of his grievance and that [the] UN legal system provides for statutory institutions like the Administrative Tribunal and the International Court of Justice with discretion to pronounce judgements in such cases entirely on its merits with powers of interpretation [of] the Rules and Regulations of the Pension Fund to ensure that its straight-jacket application does not lead to or result in gross injustice to the pension-holders.

...

10. The Applicant, therefore, appeals to the Administrative Tribunal to give its judgement in the case ..."

Whereas the Respondent filed his answer on 26 March 1997;

Whereas the Applicant filed written observations on 24 June 1997;

Whereas, on 5 November 1997, the Applicant filed additional documents with the Tribunal;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Industrial Development Organization (UNIDO) on 2 January 1982. He had been a participant in the UN Joint Staff Pension Fund (the UNJSPF or the Pension Fund) from that date until his separation from UNIDO on 30 June 1987. On 24 June 1987, the Applicant opted for an early retirement benefit, without any lump-sum commutation. In accordance with his instructions, he commenced receiving that benefit in August 1987.

On 13 September 1987, the Applicant re-entered the Pension Fund as a staff member of the United Nations Development Programme (UNDP). Payment of his early retirement benefit was thereupon suspended in accordance with article 40(a) of the Regulations and Rules of the UNJSPF (the Pension Fund Regulations).

On 18 May 1988, the Applicant wrote to the Secretary of the Pension Fund, requesting to contribute for the period of his break in service from 1 July to 12 September 1987, in order to link his prior service with UNIDO to his current service with UNDP. In a reply dated 14 July 1988, the Secretary of the Pension Fund advised him (a) that he could not pay contributions to make pensionable the period when he had not been a staff member and (b) that under article 24(a) of the Pension Fund Regulations, his prior contributory service, from 3 January 1982 to 30 June 1987, could not

be restored (he had not been entitled to a withdrawal settlement under article 31(b)(i), as he had more than five years of contributory service); and (c) that he could not link his two periods of contributory service under article 21(b) of the Regulations, as he had been paid a benefit.

On 4 and 15 January 1993, the Applicant wrote to the Secretary of the Pension Fund, reiterating the request to be permitted to link his two periods of UNJSPF participation under article 21(b) of the Pension Fund Regulations. In a reply dated 25 January 1993, the Secretary of the Pension Fund informed the Applicant that the relevant provisions of the Pension Fund Regulations precluded linking the Applicant's two periods of participation. On 15 February 1993, the Applicant requested a review of his case by the Standing Committee of the UN Joint Staff Pension Board (the Standing Committee).

On 30 September 1993, the Applicant was notified that, at its meeting held in June 1993, the Standing Committee had considered his request time-barred and therefore not receivable.

On 30 April 1994, the Applicant lodged an appeal with the Administrative Tribunal, against the decision by the Standing Committee that his appeal before that body was time-barred.

In its Judgement No. 734 of 21 November 1995, the Tribunal ruled that the Standing Committee had erred in holding that the Applicant's appeal had been time-barred. The Tribunal therefore ruled:

> "... that the appeal submitted by the Applicant on 15 February 1993, against the decision of the Secretary of the UNJSPB dated 25 January 1993, is not time-barred and should be considered by the UNJSPB on its merits."

The Applicant was then invited to submit his views on the merits of the case, which was reviewed by the Standing Committee at its 179th meeting on 17 July 1996.

On 19 August 1996, the Secretary of the Pension Fund wrote to the Applicant, advising him of the Standing Committee's decision on the merits of the case as follows:

> "...
>
> The Standing Committee considered the merits of your case on the basis of your submission, with attachments, of 26 May 1996. The Committee concluded that, by its clear terms, article 21(b) of the Regulations dealing with continuity of service did not apply in your case as in August 1987 you had commenced receiving from the Fund an early retirement benefit (...), in accordance with your payment instructions. The Committee noted further that the provisions of articles 21(b) and 24 in the Fund's Regulations, as adopted by the UN General Assembly, were statutory in nature and left no room for discretionary decisions by the Secretary of the Pension Board in individual cases. The Standing Committee consequently decided to uphold the decision taken by the Secretary that you had challenged in your appeal, as that decision had been arrived at in conformity with the applicable mandatory Regulations of the Pension Fund.
>
> ..."

On 10 November 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Pension Fund Regulations, as applied in the Applicant's case, lead to anomalous and unfair results.. The Tribunal should use its discretion to interpret the Pension Fund Regulations and Rules in such a way that they do not result in injustice to pension holders such as the Applicant.

2. The Applicant should be allowed to link his two periods of pensionable service with the Organization.

Whereas the Respondent's principal contention is:

The clear text of article 21, paragraph (b) of the Pension Fund Regulations, as approved by the General Assembly, precludes linking the Applicant's two periods of pensionable service, since he was paid an early retirement benefit. The Regulations, as adopted, leave no room for discretionary interpretation.

The Tribunal, having deliberated from 30 October to 25 November 1997, now pronounces the following judgement:

I. The Applicant requests the Tribunal to rescind the decision of the Standing Committee of the UN Joint Staff Pension Board (the Standing Committee) that two distinct periods of participation in the Pension Fund by the Applicant during service with two member organizations could not be linked. The basis for the decision was the Applicant's failure to meet the requirements of article 21(b), which provides, in part, that "participation shall not be deemed to have ceased where a participant resumes his contributory service with a member organization within 12 months after separation without a benefit having been paid to him."

II. The relevant facts are not in dispute. The Applicant resumed service with a second member organization of the Pension Fund within 75 days of separation from the first member organization; however, during that period he also received pension benefits as a consequence of having elected to receive an early retirement benefit.

III. The Applicant requests the Tribunal to find that the receipt of early retirement benefits was a "technical violation" that should not be taken into account, as it resulted in extreme hardship to the Applicant, principally in the form of reduced pension benefits. He argues that electing to receive early retirement benefits during the break in service was his only means of supporting his family and

that, in the interest of fairness, the Respondent should overlook this technical violation of article 21(b).

IV. The Tribunal has consistently held that it cannot consider questions of fairness or unfairness in the provisions of the Regulations and Rules of the Pension Fund. (Cf. Judgements No. 685, Loguinov (1994), and No. 749, Demers Dear (1996)). The Regulations do not contemplate discretionary decision-making, either by the Pension Board or by the Tribunal, of the rules themselves but only as to their appropriate application. It is, however, within the Tribunal's power to review whether the application of the Pension Fund Regulations and Rules has been effected in an arbitrary, unfair or prejudicial manner (cf. Judgements No. 360, Taylor (1985) and No. 108, Khamis (1967)). The Tribunal finds that, in this case, these Regulations have not been applied in an unacceptable manner. The Applicant should have been aware of the substance of the rule when he elected to receive the benefit.

V. For the foregoing reasons, the Applicant's claims are rejected in their entirety.

(Signatures)

Samar SEN
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

New York, 25 November 1997

R. Maria VICIEN-MILBURN
Executive Secretary